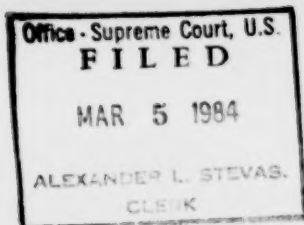


82-1470  
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No.  
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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
\_\_\_\_\_

October Term, 1983  
\_\_\_\_\_

THE MID-SOUTH GRIZZLIES  
(A Joint Venture); et al.,

*Petitioners\**

v.

THE NATIONAL FOOTBALL LEAGUE,  
An Unincorporated Association; et al.,

*Respondents\**

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**  
\_\_\_\_\_

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**PETITIONERS**

\* Petitioners are:

The Mid-South Grizzlies (A Joint Venture); John Edward Bosacco; Mid-South Grizzlies (A Limited Partnership); and Consolidated Industries, Inc.

Respondents are:

The National Football League, An Unincorporated Association; Baltimore Football Club, Inc.; Buffalo Bills, Inc.; Chargers Football Company; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; Five Smiths, Inc.; Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New York Football Giants, Inc.; New York Jets Football Club, Inc.; New Orleans Saints Louisiana Partnership; Oakland Raiders, Ltd.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc.; Rocky Mountain Empire Sports, Inc.; San Francisco Forty Niners; Seattle Professional Football, A General Partnership; St. Louis Football Cardinals Company; Tampa Bay Area NFL Football, Inc.; and Pete Rozelle.

## QUESTIONS PRESENTED FOR REVIEW

1. Where the owners of the teams in the NFL controlled and monopolized the only market for professional football in the United States, did they have an obligation under the Sherman Act, Sections I and/or II, to use fair objective and reasonable criteria in determining to exclude from play in the NFL a fully qualified professional football team?

2. Were the owners of teams in the NFL, who monopolized the professional football market in the United States, permitted by the Sherman Act to exclude a qualified owner of a new professional football team, if the exclusion was intended to maintain their monopoly and/or reserve a geographic-submarket for their exclusive future use?

3. Should this Court grant certiorari where there is a direct conflict between the Third and Ninth Circuits with regard to the important antitrust issues of (1) whether the owners of National Football League teams violate the Sherman Act by their agreements to control the place where teams are to be located and (2) of whether they are economic competitors *inter se*?

4. If for the purpose of restraining trade in the market for football players' and coaches' services, the owners of NFL teams excluded an owner of a new, fully qualified professional team from play in the NFL, and the exclusion caused the ruin of the excluded owner's business, does the excluded owner have a cause of action under the Sherman Act, Section 1 and/or 2?

5. Where the owners of professional football teams in the NFL, by written rules and other agreements, arrogate to their arbitrary, subjective discretion the power to exclude from play in the NFL any applicant thereto, however qualified, are the rules and other agreements unreasonable on their face and illegal under the Sherman Act, Section 1 and/or 2?

6. Despite relevant outstanding discovery demands, and given petitioners' reliance on the district court's confirmation that it would consider only one limited issue, did the court's grant, without oral argument, of summary judgment against petitioners based on other issues so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this courts supervisory power?

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	vii
OPINIONS BELOW .....	1
JURISDICTION .....	2
STATUTES AND RULE INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS TO GRANT THE WRIT .....	10
The Recent Opinion Of The Ninth Circuit In The Los Angeles Coliseum Case And The Instant Decision Of The Third Circuit Di- rectly Conflict. ....	10
Summary Judgment Principles Were Ap- plied In An Antitrust Case Of First Impres- sion In A Manner Conflicting With Deci- sions Of This Court. On An Expressly Limited Record And Despite Relevant Out- standing Discovery Demands, The Court Affirmed Summary Judgment, In Substan- tial Part For Failure To Adduce Evidence Beyond Discovery Limitations. ....	11
Petitioners, Buyers In The "Raw Materials Market", Were Victims Of An Admitted Conspiracy To Restrain Trade In The Mar- ket. The Court's Decision That Their Injury Was Not "Caused" By Respondent's Con- spiratorial Anticompetitive Conduct Contra- dicts Recent, Controlling Authority From This Court. ....	13
The Court Adopted A Construction Of The Sherman Act In Conflict With Congress' In- tent and This Court's Decisions When It Held That Respondents, Separate Horizontal Producers, Are Not Competitors Because They Agree To "Share" Market Revenue.	

## TABLE OF CONTENTS—(Continued)

	Page
Unable To See Competition, It Held That Arbitrary Exclusion Of Petitioners Presented "No Injury to Competition". . . . .	16
The Court's Decision Stands In Conflict With The "Essential Facility Doctrine". . .	23
Respondent's By-Laws Consigned Membership Decisions To Their Subjective Discretion Unfettered By Objective Standards, and Were So Fraught With Anticompetitive Potential As To Be Facially Unreasonable.	25
The Court Held That Exclusion Of Petitioners From The NFL Incurred No Section 2 Liability Even Assuming Monopoly Power and Intent to Maintain The Monopoly. The Court's Decision Defies Authority From This Court And Undermines The Effectiveness Of The Antitrust Laws. . . . .	27

## INDEX TO THE APPENDIX

Opinion of the Third Circuit Panel . . . . .	A-1
Order of the District Court, 11/5/82 . . . . .	A-32
Opinion of the District Court . . . . .	A-33
Memorandum Order of District Court, 8/13/81	A-63
Judgment issued in lieu of formal mandate by Third Circuit, 2/7/84 . . . . .	A-67
Order Sur Petition for Rehearing, 12/5/83 . . . .	A-69
Order staying issuance of the mandate, dated 12/23/83 . . . . .	A-71
Order staying issuance of the mandate, dated 1/9/84 . . . . .	A-73

# TABLE OF CONTENTS—(Continued)

<i>INDEX TO THE APPENDIX (cont.)</i>	Page
Order recalling certified judgment issued 2/7/84	A-75
Order staying issuance of mandate, dated 2/13/84 .....	A-78
Notice of Appeal .....	A-79
Judgment of the Third Circuit, entered 11/4/83	A-83
15 U.S.C §15 .....	A-84
15 U.S.C §1 .....	A-84
15 U.S.C §2 .....	A-85
15 U.S.C §1291 .....	A-85
15 U.S.C §1292 .....	A-86
15 U.S.C §1293 .....	A-86
15 U.S.C §1294 .....	A-87
15 U.S.C §1295 .....	A-87
Fed. R. Civ. P. Rule 56 (b), (c), (f) .....	A-88
Complaint .....	A-89
Answer .....	A-111
Letter dated 8/20/81 from Mr. Alexander to Judge McGlynn .....	A-125
Letter dated 9/10/81 from Mr. Alexander to Judge McGlynn .....	A-128
Letter dated 9/16/81 from Mr. Rubenstone to Judge McGlynn .....	A-133
Letter dated 9/18/81 from Judge McGlynn to Mr. Rubenstone .....	A-136
Letter dated 9/23/81 from Mr. Weisberg to Judge McGlynn .....	A-138

# TABLE OF CONTENTS—(Continued)

<i>INDEX TO THE APPENDIX (cont.)</i>	Page
Letter dated 12/4/81 from Mr. Alexander to Judge McGlynn .....	A-141
Letter dated 12/10/81 from Mr. Rome to Judge McGlynn .....	A-147
Letter dated 12/15/81 from Mr. Green to Judge McGlynn .....	A-148
Letter dated 12/17/81 from Judge McGlynn to Messrs. Alexander and Green .....	A-150

## TABLE OF AUTHORITIES

Cases:	Page
<i>American Federation of Tobacco Growers v. Neal</i> , 183 F.2d 869 (4th Cir. 1950) .....	29
<i>Arizona v. Maricopa County Medical Society</i> , 457 U.S. 332, 102 S.Ct. 2466 (1982) .....	12
<i>Associated Press v. United States</i> , 326 U.S. 1, 65 S.Ct. 1416 (1945) .....	14, 18, 23, 28
<i>Blalock v. Ladies Professional Golf Ass'n.</i> , 359 F.Supp. 1260 (N.D. Ga. 1973) .....	29
<i>Blue Shield of Virginia v. McCready</i> , 457 U.S. 465, 102 S.Ct. 2540 (1982) .....	15, 16
<i>Board of Education v. Pico</i> , 457 U.S. 853, 102 S.Ct. 2799 (1982) .....	12
<i>Board of Regents v. National Collegiate Athletic As- sociation</i> , 546 F.Supp. 1276 (W.D. Okla. 1982) <i>aff'd in part, reversed and remanded in part</i> , 707 F.2d 1147 (10th Cir.), <i>cert. granted</i> , — U.S. —, 104 S.Ct. 272 (1983) . . .	10, 14, 19-21, 25
<i>Byars v. Bluff City News Co., Inc.</i> , 609 F.2d 843 (6th Cir. 1980) .....	28
<i>Costlow v. United States</i> , 552 F.2d 560 (3rd Cir. 1977) .....	11
<i>Cromar Co. v. Nuclear Materials &amp; Equipment Corp.</i> , 543 F.2d 501 (3rd Cir. 1976) . . .	15, 16, 17
<i>Dick v. New York Life Ins. Co.</i> , 359 U.S. 437 (1959)	10
<i>Gamco, Inc. v. Providence Fruit &amp; Produce Bldg., Inc.</i> , 194 F.2d 484 (1st Cir.), <i>cert. denied</i> , 344 U.S. 817 (1952) .....	14, 23, 26, 29
<i>Kiefer-Stewart Co. v. Joseph E. Sagram &amp; Sons</i> , 340 U.S. 211, 71 S.Ct. 259 (1951) .....	17
<i>Lorain Journal Co. v. United States</i> , 342 U.S. 143, 72 S.Ct. 181 (1951) .....	28

# TABLE OF AUTHORITIES—(Continued)

Cases:	Page
<i>Los Angeles Memorial Coliseum Comm'n. v. National Football League</i> , __ F.2d __, No. 82-5572, <i>et al.</i> , slip op. (9th Cir., filed 28 February 1984) . . . . .	10
<i>Magnum Import Co. v. DeSpoturno Coty</i> , 262 U.S. 159 (1922) . . . . .	10
<i>Mid-South Grizzlies, et al. v. National Football League, et al.</i> , 550 F.Supp. 558 (E.D. Pa. 1982), <i>aff'd</i> , 720 F.2d 772 (3rd Cir. 1983) . . . . .	<i>passim</i>
<i>Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.</i> , 394 U.S. 700, 89 S.Ct. 1391 (1969) . . . . .	12
<i>North American Soccer League v. National Football League</i> , 670 F.2d 1249 (2d Cir. 1982), <i>cert. denied</i> , __ U.S. __, 103 S.Ct. 499 (1983) . . . . .	17, 18, 23
<i>Perma Life Mufflers, Inc. v. International Parts Corp.</i> , 392 U.S. 134, 88 S.Ct. 1981 (1968) . . . . .	17, 20, 29
<i>Poller v. Columbia Broadcasting Systems, Inc.</i> , 368 U.S. 464, 82 S.Ct. 486 (1962) . . . . .	12
<i>Silver v. New York Stock Exchange</i> , 373 U.S. 341, 83 S.Ct. 1246 (1963) . . . . .	18, 23, 26, 28
<i>Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.</i> , 365 F.2d 478 (5th Cir. 1966) . . . . .	26
<i>United States v. Associated Press</i> , 52 F.Supp. 362 (S.D. N.Y.), <i>affirmed</i> , 326 U.S. 1, 80 S.Ct. 527 (1943) . . . . .	29
<i>United States v. Griffith</i> , 334 U.S. 100, 68 S.Ct. 941 (1948) . . . . .	27, 28
<i>United States v. International Boxing Club of N.Y.</i> , 348 U.S. 236, 75 S.Ct. 259 (1955) . . . . .	23, 28

# TABLE OF AUTHORITIES—(Continued)

## Cases: Page

<i>United States v. Realty Multi-List, Inc.</i> , 629 F.2d 1351 (5th Cir. 1980) . . . . .	25, 26, 28
<i>United States v. Terminal R.R. Ass'n. of St. Louis</i> , 224 U.S. 383, 32 S.Ct. 507 (1912) . . . . .	23, 28

## Statutes & Rules:

15 U.S.C. §§1&2 . . . . .	<i>passim</i>
15 U.S.C. §15 . . . . .	<i>passim</i>
15 U.S.C. §§1291-1295 . . . . .	3, 18, 19, 21, 22
28 U.S.C. §1254(1) . . . . .	2
28 U.S.C. §1291 . . . . .	4
28 U.S.C. §1337 . . . . .	4
Fed. R. Civ. P. 56 (b), (c), (f) . . . . .	3
Sup. Ct. R. 29.1 . . . . .	2

## Other Authorities:

Congressional Record, No. 112, pp. 28231-28234 (20 Oct. 1966) . . . . .	22, 23
Senate Report No. 89-1654, 89th Cong. 2d Sess. (1966) . . . . .	21
Senate Report No. 92-1151, 92nd Cong. 2d Sess. (1972) . . . . .	22
L. Sullivan, Antitrust (1977) . . . . .	28
U.S. Code Cong. & Admin. News, p. 4378 (1966) . . . . .	21

No.

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IN THE  
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October Term, 1983

---

THE MID-SOUTH GRIZZLIES  
(A Joint Venture); et al.,

*Petitioners\**

v.

THE NATIONAL FOOTBALL LEAGUE,  
An Unincorporated Association; et al.,

*Respondents\**

---

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

---

Petitioners above named pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this action 4 November 1983, rehearing and rehearing *en banc* denied on 5 December 1983.

**OPINIONS BELOW**

The orders of the Third Circuit dated 23 December 1983, 9 January 1984, and 13 February 1984, staying the issuance of its mandate, are reprinted at PA 71, 73, 78.<sup>1</sup>

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\* Petitioners and Respondents are enumerated on the inside front cover.

1. References to the Appendix to the Petition for Writ of Certiorari are designated "PA—".

The order of the Third Circuit denying rehearing and rehearing *en banc* on 5 December 1983 is reproduced at PA 69.

The judgment of the Third Circuit entered on 4 November 1983, affirming the judgment of the District Court entered on 5 November 1982, is reprinted at PA 83.

The opinion of the panel of the Third Circuit, dated 4 November 1983, is reported. *Mid-South Grizzlies, et al. v. National Football League, et al.*, 720 F.2d 772 (3rd Cir. 1983) (per Gibbons, J.), reprinted at PA 1.

The order of United States District Court for the Eastern District of Pennsylvania, McGlynn, J., entered 5 November 1982, granting respondents' (defendants therein) motion for summary judgment is reprinted at PA 32.

The opinion of the District Court, dated 5 November 1982, is reported. *Mid-South Grizzlies, et al. v. National Football League, et al.*, 550 F.Supp. 558 (E.D. Pa. 1982) (per McGlynn, J.), reprinted at PA 33.

## JURISDICTION

The judgment of the Third Circuit affirming the district court's grant of summary judgment to respondents (defendants below) was entered on 4 November 1983. A timely filed petition for rehearing *en banc* was denied on 5 December 1983, and the 90 days in which to file this petition for writ of certiorari ended on Sunday, 4 March 1984. This petition, filed on or before Monday, 5 March 1984, was timely filed. Sup. Ct. R. 29.1.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

**STATUTES AND RULE INVOLVED**

The Clayton Act, §4 (15 U.S.C. §15), *reprinted at* PA 84.

The Sherman Act, §§1&2 (15 U.S.C. §§1&2), *reprinted at* PA 84.

Act of 30 September 1961, Pub. L. 87-331, §§1-5, 75 Stat. 732, *codified at* 15 U.S.C. §§1291-1295 (exemption from antitrust laws of agreements covering "sponsored telecasting" of professional sports contests), *reprinted at* PA 85.

Act of 8 Nov. 1966, Pub. L. 89-800, §6(b)(1-3), 80 Stat. 1515, *codified at* 15 U.S.C. §§1291-1293 (exemption from antitrust laws of agreement combining operations of professional football leagues into one league), *reprinted at* PA 85.

Fed. R. Civ. P. 56(b), (c), (f) (summary judgment for defending party), *reprinted at* PA 88.

## STATEMENT OF THE CASE

Petitioners originally brought this action in the United States District Court for the Eastern District of Pennsylvania to secure treble damages authorized by the Clayton Act, §4 (15 U.S.C. §15) for respondents' violations of the Sherman Act, §§1&2 (15 U.S.C. §§1&2). The district court had jurisdiction under 28 U.S.C. §1337. The district court granted respondents' second ("renewed") motion for summary judgment on 5 November 1982. Petitioners timely took an appeal to the United States Court of Appeals for the Third Circuit. The Third Circuit had jurisdiction under 28 U.S.C. §1291. A unanimous panel of the Third Circuit issued an opinion and entered judgment affirming the district court. The Third Circuit thereafter denied a timely filed petition for rehearing *en banc*.

In late 1975, petitioners owned a professional football team which had played in the World Football League ("WFL"). In October 1975, the WFL had ceased operations as a league. Intending to exploit their asset by entering the National Football League ("NFL"), petitioners contributed an additional \$450,000 of further venture capital and maintained their team in fully operational status. They kept a full squad of professional football players under contract, as well as full coaching and management staffs. They also had a stadium lease and a commitment from a consortium of banks in Memphis for \$10 million in financing. They solicited and received \$10 deposits on season tickets from more than 40,000 fans in the greater Memphis area.

Petitioners then sought, but were refused, admission to the NFL. The NFL was an unincorporated association of 28 separate owners of professional football teams. With the demise of the WFL, petitioners owned, in 1975-1976, the 29th, and only other, professional football team in the United States. Respondents, the members of the NFL, held an absolute monopoly of the U.S. market for professional football.

Respondents' Constitution and By-Laws prescribed the criteria for membership: "any" person or group of "good repute" which "operated for profit" was eligible for membership. NFL Constitution and By-Laws, Article III, §3.2 (1974) ("By-Laws"). Petitioners qualified for membership. 720 F.2d at 786. The By-Laws also prescribed that in expanding the NFL, the nonmember owner of the proposed new team initiated the process when he filed a written application, in which, *inter alia*, he was to "designate the city" which would be the new member's home territory. *Id.*, §3.3(A). The By-Laws required that respondent Rozelle conduct such investigation of the applicant as he deemed necessary, and required that he then "submit the application to the members for approval". *Id.* §3.3(B).

Respondents admitted that they consistently ignored the By-Laws' requirements when new memberships were at issue, and instead added new teams only when and where it suited them. Rooney Depo., v. 1 at 43-47; Rozelle Depo. at 75-76, 102-103. Moreover, respondents ignored applications. The threshold determination of expansion *vel non* was the product of respondents' own "feeling" and respondents "subjective" concerns. Rozelle Depo. at 42, 74-76, 102.

Respondents admitted that there was neither investigation nor substantive consideration of petitioners application. Schramm Depo. at 161 (doubts that he even reviewed the application in any great detail); Phipps Depo. at 140 (unaware of any investigation into merits of application); Rooney Depo., v. 2 at 136 (no one conducted an extensive study of application). Respondents simply agreed to impose a moratorium on new entry to the market (Rooney Depo., v. 2, at 229, 235; Schramm Depo. at 176; Spadia Depo. at 52, 79; Phipps Depo. at 131), thereby keeping more money to themselves by excluding a new producer. Rozelle admitted that, short of a "court order", there was no incentive which petitioners could have offered, no price which petitioners could

have paid, no term or condition of entry to which petitioners could have consented, which would have gained petitioners' entry to the NFL.<sup>2</sup>

Petitioners, excluded from the NFL, were forced to liquidate their business.

In December 1979, petitioners timely filed the instant action for treble damages under the Clayton Act, §4 (15 U.S.C. §15). Petitioners claimed that respondents' refusal to admit them to the NFL was both a group boycott and an otherwise unreasonable restraint of trade under the Sherman Act, §1 (*id.*, §1). Petitioners further claimed that the refusal was an unlawful attempt to maintain, or an unlawful act to protect respondents' monopoly, in violation of the Sherman Act, §2 (*id.*, §2). Complaint, PA 90.

Petitioners filed discovery which respondents refused. Petitioners filed a motion to compel. While the motion was still pending, respondents filed their first

2 Rozelle testified:

Q. Is there anything that the Plaintiffs, Mr. Bassett, or anyone that was related to them could have done between November and the meeting in Coronado that you know of right now that would have changed the mind of the League, so to speak, about accepting Memphis as a team for 1976 or for 1977?

A. Because of the circumstances we are going through, we spent a great deal of time discussing other things. *The only thing I could think of is a court order.*

Q. Other than a court order, the answer would be no?

A. *I can't imagine any other way.*

...

Q. Would you agree that all references throughout your entire deposition to a vote against the Plaintiffs or against Bassett or against Memphis was, in reality, not a vote against the Plaintiffs, Mr. Bassett, the Grizzlies, but rather *just a vote by the League not to expand, not to consider further expansion at that time?*

A. Yes.

Rozelle Depo. at 506-507 (emphasis supplied).

motion for summary judgment, supported by 2 affidavits, addressing all issues cognizable under the Section 1 and 2 Sherman Act claims. When the district court heard oral argument on the summary judgment motion, petitioners' motion to compel was still undecided, and had been for eight months. They required that discovery in order adequately to take depositions and oppose summary judgment.

Because petitioners lacked discovery, the district court declined to consider respondents' motion for summary judgment; it also declined to rule on petitioners' motion to compel. Rather, the court determined to focus on a narrow, limited factual issue, *i.e.*, whether respondents had articulated any reasonable, objective standards governing the admission of new enterprises to the NFL, and had applied any such standards to petitioners' application. The court expressly confirmed that it intended to *accept as true* the allegations in the complaint concerning all material facts other than those related to "this discrete area" of whether "the NFL applied objective standards to the plaintiffs' application". PA 137. The court declined to rule on both petitioners' original motion to compel and petitioners' two subsequent motions to compel addressed to later written discovery requests. PA 137. Instead, the court deferred all discovery to a later time, except the limited discovery related to the discrete area of objective standards. The court restricted petitioners to 5 specified depositions, and expressly limited the scope of these to the discrete area of objective standards. PA 64-65, 136-137, 150.

The district court confirmed that it intended to restrict its attention to the "discrete area" of objective standards.<sup>3</sup>

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3. At the close of the limited discovery, petitioners requested a conference with the court at which they would demonstrate unquestionably the existence of disputed facts material to the objective standards issue. PA 148-149. The district court denied a conference and determined to allow respondents to move for summary

But respondents did not confine their second ("renewed") motion for summary judgment to the "discrete area" concerning "objective standards" to which the court had confined petitioners' discovery. Rather, respondents' second motion renewed the entire spectrum of issues and arguments implicated under rule of reason and monopolization analyses.

Without allowing oral argument, the district court granted respondents' second motion for summary judgment. 550 F.Supp. 558 (E.D. Pa. 1982), *reproduced at* PA 33. In a single sentence, the district court dismissed petitioners' three outstanding motions to compel as irrelevant. 550 F.Supp. at 565.

On appeal, a panel of the Third Circuit acknowledged the district court's restrictions of petitioners' discovery. Moreover, the circuit court noted that petitioners' 3 outstanding motions to compel discovery, upon which the district court had declined to act, sought discovery admittedly relevant to: (1) the "'objective standards' issue"; (2) proof of respondents' "motive for exclusion" of petitioners; (3) proof concerning the "competition issue"; (4) proof of petitioners' "retaliation claim" under the Sherman Act, §2; (5) proof of petitioners' "allegation [of] conspiratorial, anti-competitive activities"; (6) proof which "would establish [the] element of competition between plaintiff [sic] and defendant [sic] for geographical market"; and (7) proof of "competition for the Memphis home team market". 720 F.2d at 780-783 n.5. Yet the circuit court affirmed summary judgment.

On the limited factual record thus before it, the circuit court held as a matter of law that respondents had categorically no obligation under the Sherman Act to ad-

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*Note 3—Continued*

judgment on the objective standards issue, stating that if they could show without dispute that they had applied objective standards in considering petitioners' application, then that very well might be "the end of the litigation ballgame." PA 150.

mit any applicant to play in the NFL. The court found that respondents had complete monopoly power in the market, and held that respondents enjoyed unfettered discretion to exercise arbitrary power over admissions to the market which they monopolized. The court held that Congress had conferred this monopoly power on respondents and had evinced its intent that competition between them for both broadcast revenue and geographic-submarkets be eliminated. 720 F.2d at 785. Thus, the court held, exclusion of an applicant, even though arbitrary and the product of anticompetitive intent, could have no contra-competitive effect and did not violate the Sherman Act, §2. 720 F.2d at 787.

As to petitioners' Section 1 claims, the circuit court found the necessary agreement and concerted action (720 F.2d at 786), and assumed *arguendo* that petitioners qualified for admission and that there existed disputed material facts concerning respondents' intent or motivation to exclude petitioners. But the court held that all of that was "immaterial". 720 F.2d at 786. The court held that because respondents agree to "share" the "most part" (720 F.2d at 786-787) of their revenue, they thus are not competitors for that money. The court accepted *arguendo* that there could be competition among respondents in some geographic-submarket for non-shared, locally derived revenue. But the panel held that petitioners had failed to show "the existence of competition among NFL members and a potential franchise at Memphis" for such non-shared revenue. 720 F.2d at 787.

Petitioners claimed in the district court and before the circuit court that respondents compete in a "raw materials market" for players' services, coaches, training and management staff, etc. *E.g.*, Complaint, ¶62(d), 63(b), PA 107-108. Petitioners claimed that a purpose animating respondents' exclusion of petitioners was to restrain trade in this raw materials market. The circuit court accepted *arguendo* both competition in this mar-

ket and an anticompetitive effect on the market, but could see no injury to petitioners' business or property "caused" by any reduction of competition in the raw materials market. Thus, the court held that here too respondents' exclusion of petitioners had produced no cognizable antitrust injury. 720 F.2d at 787.

### REASONS TO GRANT THE WRIT

#### **The Recent Opinion Of The Ninth Circuit In The Los Angeles Coliseum Case And The Instant Decision Of The Third Circuit Directly Conflict.**

There is a direct conflict with the decisions of the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Third Circuit with regard to the central antitrust issues in this case; whether respondents' agreements to control where teams are to be located restrains competition in violation of the Sherman Act, and whether the individual team owners are economic competitors *inter se*. The Ninth Circuit said "yes" in *Los Angeles Memorial Coliseum Comm'n. v. National Football League*, \_\_\_ F.2d \_\_\_, No. 82-5572, *et al.*, slip op. (9th Cir., filed 28 February 1984). In the instant case, the Third Circuit said "no".

It is well settled that one major function of the Supreme Court is to "preserve uniformity of decision among the intermediate courts of appeal." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 453 (1959) [Frankfurter, J., dissenting]. *Accord: Magnum Import Co. v. LeSpoturno Coty*, 262 U.S. 159, 163 (1922).

The principles here at issue are general and affect all sports leagues. The Ninth Circuit decision accords generally with the Tenth Circuit on these principles in *Board of Regents of the Univ. of Oklahoma v. National Collegiate Athletic Ass'n.*, 707 F.2d 1147 (10th Cir.), *cert. granted*, \_\_\_ U.S. \_\_\_, 104 S.Ct. 272 (1983). Only the Third Circuit has decided these issues differently, and wrongly. Because the Ninth and Third Circuit

decisions are contemporaneous, this Court may wish to consolidate both for certiorari review.

**Summary Judgment Principles Were Applied In An Antitrust Case Of First Impression In A Manner Conflicting With Decisions Of This Court. On An Expressly Limited Record And Despite Relevant Outstanding Discovery Demands, The Court Affirmed Summary Judgment, In Substantial Part For Failure To Adduce Evidence Beyond Discovery Limitations.**

Relying on the district court's direction, petitioners completed discovery in the one "discrete area" allowed by the court. But respondents renewed their earlier motion for summary judgment and re-raised all the issues they had earlier raised. Without oral argument, the district court granted respondents' motion for summary judgment, not limiting itself to the single issue it had told petitioners it would consider. Instead, it considered every issue, deciding in particular that respondents were in fact not competitors and that therefore the Sherman Act had no office to fulfill.

Having denied oral argument and denied full discovery, the district court abused its summary judgment authority. The Third Circuit itself has held:

But by acting on the motion for summary judgment without argument, and without reference to what might be developed in discovery, which was being diligently pursued, the court erred.

*Costlow v. United States*, 552 F.2d 560, 564 (3rd Cir. 1977). In the instant case, petitioners pursued discovery as far as the district court's limitation allowed. Petitioners obeyed the district court's direction, taking the court at its word. They limited not only their discovery against respondents but also their own affirmative evidence to the one discrete area which the court itself had identi-

fied. Mr. Justice Powell, dissenting, has touched upon the error of the district court here:

The Court concedes that "the parties conducted [only] a limited amount of pretrial discovery" . . . leaving undeveloped facts critical to an informed decision of this case. I do not think today's decision on an incomplete record is consistent with proper judicial resolution of an issue of this complexity, novelty, and importance to the public.

*Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 2480 (1982).

If the district court had changed its mind and had determined to decide all issues presented by respondents' renewed motion, its only proper course was to continue the matter and to afford petitioners full discovery on all issues raised under the rule of reason analysis which it purported to apply.<sup>4</sup>

On appeal, the circuit court approved the district court's conduct, even while itself expressly contradicting the district court's holding that all of petitioners' outstanding discovery requests were irrelevant. The circuit court found that the outstanding discovery demands were relevant to proof regarding not only objective standards, but also respondents' motive for excluding petitioners, competition among respondents *inter se* and

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4. Even after full discovery, summary judgment for respondents would have been entirely improper given the issues concerning their motive and intent behind their exclusion of petitioners (*Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 472-473, 82 S.Ct. 486, 491 (1962)), their "business justification" defense and "self-serving disclaimer" of any competition *inter se* (*Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 702-703, 89 S.Ct. 1391, 1392-1393 (1969)), and their "highly irregular and ad hoc" procedures (*Board of Education v. Pico*, 457 U.S. 853, 102 S.Ct. 2799, 2811-2812 (1982)) governing their exclusionary decision, which "plainly do[] not foreclose the possibility that [their] decision . . . rested decisively [in their subjective motivation]" (*ibid.*).

for the Memphis geographic-submarket, and respondents' conspiratorial anticompetitive activities. 720 F.2d at 780-783 n.5.

The court made no finding that petitioners in Memphis and other NFL teams would *not* compete, even though it was respondents' burden so to prove on their motion for summary judgment. Petitioners' outstanding requests for production demanded the season ticket holder mailing lists, correspondence between NFL members and fans, and opinion polls and market surveys of NFL teams in the region surrounding Memphis. *Ibid.* The court admitted that these requests "would tend to suggest the possibility of competition for the Memphis home team market". *Ibid.* Yet it affirmed the refusal of this discovery and in the next breath faulted petitioners for failing to prove the facts to which the discovery was addressed. 720 F.2d at 786-787.

Petitioners argue here that something is very wrong when summary judgment in a major antitrust case of first impression is granted and affirmed on the basis of merely 5 depositions limited in scope and the purported failure of the plaintiffs below to adduce proof beyond the limited scope authorized by the district court. The district court's practice here denied petitioners due process and so far departed from the accepted and usual course of judicial proceedings, and the circuit court so far sanctioned such departure, as to call for this Court's exercise of its supervisory power.

**Petitioners, Buyers In The "Raw Materials Market", Were Victims Of An Admitted Conspiracy To Restrain Trade In The Market. The Court's Decision That Their Injury Was Not "Caused" By Respondents' Conspiratorial Anticompetitive Conduct Contradicts Recent, Controlling Authority From This Court.**

The circuit court implicitly accepted that a relevant product-submarket is the "raw materials market" for players' and coaches' services, and implicitly accepted

*arguendo* both respondents' anticompetitive intent to restrain trade in that market and an anticompetitive effect on it from excluding petitioners. But the court stated that the exclusion of petitioners "in no way restrained [petitioners] from competing for players by forming a competitive league." 720 F.2d at 787. This finding directly conflicts with the court's own earlier admission that forming a rival league was not a reasonably available alternative. 720 F.2d at 785 n.7 & accompanying text ("no doubt" that NFL "presents a formidable barrier to entry by a competitive football league"). Faced with the "formidable barrier" to formation of a rival league which the NFL posed, petitioners were not required to form such a league. *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945); *Board of Regents of the Univ. of Oklahoma v. National Collegiate Athletic Ass'n.*, 546 F.Supp. 1276, 1288 (W.D. Okla. 1982), *aff'd in part and rev'd in part on other grounds*, 707 F.2d 1147 (10th Cir.), *cert. granted*, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 272 (1983); *Gamco Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952). The relevant restraint in this context is the restraint imposed upon the players by arbitrarily eliminating petitioners, who would otherwise have been an additional buyer of their services. Unless the court could hold on the record that a rival league was a reasonable, practicable alternative, it could not dismiss from consideration the anticompetitive effect on players and coaches of excluding petitioners from the NFL.

The court seemed to consider any effect on the raw materials market irrelevant, because petitioners

fail[ed] to explain how, if their exclusion from the league reduced competition for team personnel, that reduction caused an injury to [their] business or property.

720 F.2d at 787 (citation omitted).

The injury to petitioners was the forced liquidation of their business and the loss of expected profits. In the circumstances prevailing after October 1975, petitioners, who owned a professional football team and wanted to exploit and market their asset, had no reasonable alternative to membership in the NFL. Their exclusion from the NFL directly caused the failure of their business. They alleged in their complaint (PA 107-108) and the circuit court seemed to accept *arguendo*, that their exclusion was a means by which respondents restrained trade in the raw materials market, to respondents' advantage. From this, the court should have held that petitioners' injury was directly caused by respondents' conspiratorial anticompetitive conduct, and that petitioners had asserted a valid antitrust action. *Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 505-510 (3rd Cir. 1976) ("producer-participant" in industry whose elimination was instrumental in co-producer's acquisition of monopoly power had standing to sue).

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540 (1982), this Court held that Section 4 of the Clayton Act

does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . The Act is comprehensive in its terms and coverage, protecting *all who are made victims of the forbidden practices* by whomever they may be perpetrated.

457 U.S. at —, 102 S.Ct. at 2545 (emphasis supplied; quotation and citation omitted). This Court further held that an insured who had been denied reimbursement for specified medical services had standing to sue the insurer for its participation in an anticompetitive conspiracy aimed not at the insured but at the medical care providers, because the denial of reimbursement "was the very means by which" the insurer allegedly "sought to achieve its illegal ends". 457 U.S. at —, 102 S.Ct. at

2549. The injury was the non-reimbursed cost of the services. The Court held:

The harm to McCready . . . was clearly foreseeable; indeed it was a necessary step in effecting the ends of the illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "the type of loss that the claimed violations . . . would be likely to cause."

*Ibid.* (citation omitted).

McCready was not an economic actor in the market which the insurer had conspired to restrain. Yet she had standing to sue for injury to her property because infliction of that injury was the very means to the anticompetitive end. Here, petitioners were a producer-participant in the professional football market and a buyer in the raw materials market for playing and coaching talent. The elimination of petitioners as a buyer in the market was not only the means by which trade in the market was sought to be restrained, it was in and of itself the actual restraint. Petitioners were not merely made the victims of forbidden practices, but the victimization was itself the forbidden practice. Causation, then, is established. By holding the contrary, the circuit court decided this question in direct conflict with *Cromar* from its own circuit, and with *McCready* from this Court.

**The Court Adopted A Construction Of The Sherman Act In Conflict With Congress' Intent And This Court's Decisions When It Held That Respondents, Separate Horizontal Producers, Are Not Competitors Because They Agree To "Share" Market Revenue. Unable To See Competition, It Held That Arbitrary Exclusion Of Petitioners Presented "No Injury to Competition".**

On appeal, the circuit court accepted as undisputed respondents' claims that they "share" revenue, and,

echoing the district court, opined that petitioners "sought to participate" in the "revenue sharing arrangement" (720 F.2d at 776). The court then held that respondents are not competitors *inter se* with respect to their shared revenue activities. Rather, "the congressionally authorized arrangements under which the NFL functions eliminate competition among the league members." 720 F.2d at 786. The court, in effect, held that because respondents agree to share certain revenue, they are not competitors for the cartel pie, and since petitioners wanted a share of the pie, petitioners did not want to compete but to join as a noncompeting cartel member. Blinded by the "absence of any appearance of competition" (*Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 511 (3rd Cir., 1976)), the court could see no office for the antitrust laws to perform. In particular, the court could not see that using the Sherman Act to force the monopolists to share their market with a new market entrant is, by definition, to force the market to be opened up to competition.

Respondents are independent business entities unrelated in any way except by membership in a common trade association, the NFL. 720 F.2d at 775 (each member of association an "entity" organized for profit), 782 n.5 (accepting as fact compliance with prohibition of financial interest by one entity in any other). Having structured themselves as separate business entities "organized for profit" (*id.* at 775), they are fully subject to the Sherman Act, §1. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-142, 88 S.Ct. 1981, 1986 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215, 71 S.Ct. 259, 261 (1951); *North American Soccer League v. National Football League*, 670 F.2d 1249, 1256-1258 (2d Cir., 1982), *cert. denied*, — U.S. —, 103 S.Ct. 499. Thus, agreements between respondents concerning trade are fully subject to antitrust scrutiny, whether respondents are

competitors *inter se* or not,<sup>5</sup> and whether or not they have agreed to share all or some portion of the revenue to be made in the market.

Respondents are in fact competitors, albeit competitors who have (for the present) agreed to divvy-up the proceeds from one marketable commodity, broadcast rights to "sponsored telecasting". Congress exempted from the antitrust laws the "joint agreement" by which respondents sell their broadcast rights to "sponsored telecasting". 15 U.S.C. §1291. Congress specifically did *not* exempt any agreements by which respondents choose to distribute the revenue gained on the sale. *Id.* §1294. Any scheme of distribution therefore must be reasonable under the Sherman Act, §1. By excluding petitioners from participating in the market, respondents schemed in effect to distribute the broadcast revenue pie only among themselves. Respondents thus conspired to hoard for themselves all of the money which can be earned from marketing major-league professional football teams. To the extent that the conspiracy succeeded, trade was obviously restrained. If respondents denied petitioners this market opportunity arbitrarily, without applying objective standards, the restraint was unreasonable under the Sherman Act, §1. *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246 (1963); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945).

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5. Even assuming *arguendo* that respondents were, in the NFL, "entities engaged in a joint venture" (*North American Soccer League, supra*, 670 F.2d at 1252), who thus would not be competitors *inter se vis-a-vis* the venture, nonetheless that would

not exempt from the Sherman Act an agreement between its [NFL's] members to restrain competition. . . . The NFL members have combined to protect and restrain not only leagues but individual teams. The sound and more just procedure is to judge the legality of such restraints according to well-recognized standards of our antitrust laws rather than permit their exemption . . . .

*Id.*, 670 F.2d at 1257.

Though an agreement jointly marketing respondents' broadcast rights to sponsored telecasting was exempted by Congress from antitrust purview, Congress neither required that such agreement be reached, nor that it last forever, nor that the television networks must necessarily subscribe to it. In 1976, when respondents passed their formal resolution excluding petitioners, their television contract extended only to 1978. There was no agreement in place with the networks for 1979 or thereafter, and despite respondents' desires not to compete *inter se* for sales to the networks, the networks were free to insist upon such competition. See *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n.*, 707 F.2d 1147 (10th Cir.), *cert. granted*, — U.S. —, 104 S.Ct. 272 (1983).<sup>6</sup> By excluding petitioners, respondents limited the number of sellers in the market and eliminated the opportunity for some network, whether commercial ("sponsored"), pay or cable, to buy independently from an additional seller. Respondents patently restrained trade, and their exclusionary decision is manifestly subject to antitrust review.

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6. A joint agreement among respondents, by which the NFL as a league sells or transfers all or any part of respondents' broadcast rights in sponsored telecasting of their games, is expressly exempted from the antitrust laws. 15 U.S.C. §1291. The applicability of the antitrust laws to every other "act, contract, agreement, rule, course of conduct or other activity" of respondents (except the merger-agreement also listed in §1291) is unaffected by the exemption allowed in §1291. *Id.*, §1294. Thus, only the agreement by which the league actually sells or transfers some or all of the broadcast rights of its members is protected by §1291.

An agreement by all of the members to refuse to sell anything other than a total, pooled package is therefore not protected. Rather, a network is free to negotiate a sale with one or a few of the league's members, ignoring the others. An agreement by a majority of league-members to coerce a minority to subscribe to the league's package-sale agreement on threat of expulsion is therefore not protected. Rather, only the sale agreement itself, between those members who subscribe to it, is protected. If the members may not expel an existing member who refused to subscribe to a joint agreement

In the market for live-television broadcasting of college football, structured indistinguishably from the market here, the Western District of Oklahoma readily dispatched as "incredible" the argument by the National Collegiate Athletic Association that its football-producing members were not competitors. *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n.*, *supra*, 546 F.Supp. at 1306. The district court in *Board of Regents* expressly found that the NCAA's football-producing members were horizontal competitors *inter se* despite revenue sharing. 546 F.Supp. at 1304 (NCAA revenue sharing controls held "horizontal agreements among competing sellers to limit the availability of their products"). The 28 business entities associated in the NFL are no less competitors *inter se* in the major-league, professional football market. It makes no logical difference that plaintiffs in *Board of Regents* were already members threatened with expulsion, as contrasted with the instant petitioners who were nonmembers of the NFL excluded from admission.

On appeal in *Board of Regents*, a Tenth Circuit panel fully affirmed this analysis of the competitive nature of the product-market. It held that the challenged revenue-sharing arrangement was an agreement among horizontal competitors to restrict their market shares. It was

not persuaded by the NCAA's contention that the plaintiffs are merely seeking a "bigger slice of the [cartel] pie" . . . . In *Perma Life Mufflers* . . . , similar arguments were made and rejected.

707 F.2d at 1151 (citations omitted).

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Note 6—*Continued*

on the expectation that negotiating independently he could command a larger share of the broadcast revenues, then perforce they may not exclude a prospective member who seeks to gain some share, albeit equal, of the broadcast revenues.

Expressed in the words of the circuit court in *Board of Regents*, the NFL is an economic integration of horizontal market producers, "a combination of . . . all the producers, actual or potential, of a differentiated product — commercially salable [professional] football." 707 F.2d at 1156. The NFL, like the NCAA, "is essentially an integration of the rulemaking and rule-enforcing activities of its member[s] . . ." (*id.* at 1153). In 1966, the then extant AFL and NFL were competing market integrations, each indistinguishable in nature and function from the present NCAA. The present NFL is distinguishable only in so far as it is a super-integration of the two formerly competing integrations, born perhaps to congressional midwiving, but there the tender ministrations stopped.

Contrary to the view of the circuit court here, Congress granted no license to the suprastructure thus created to arbitrarily exclude future, actual or potential, producers from the market. Congress manifestly intended the contrary: to open up the industry, to compel these respondents to accomodate more teams in more cities than the NFL had theretofore allowed. To aid in achieving that result, Congress exempted the agreement to merge only on the express condition that the merged league "increase rather than decrease the number of professional football clubs so operating [in the merged league]". 15 U.S.C. § 1291. See 1966 U.S. Code Cong. & Admin. News, at 4378.<sup>7</sup>

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7. The merger-exemption, narrowly drawn, applies by its terms solely to the two leagues' agreement "to combine in a single league". It does not apply to any other agreement. It did "not extend to the combined league any greater antitrust immunity" than the separate, competing leagues or their members individually had enjoyed; it did "not seek to resolve any of the antitrust problems of professional football" existing prior to the merger. Senate Rpt. No. 89-1654, 89th Cong. 2d Sess. (1966).

Representative Celler's remarks in debate on the NFL's merger-exemption (15 U.S.C. § 1291 (amended 8 Nov. 1966)) are

The temperament of the circuit and district courts below should therefore have been ever the more stridently insistent that this particular, monopolized product be as widely marketed through as vigorous a competitive process as possible. But the circuit court's decision here conferred in practical effect precisely the

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NOTE 7— *Continued*

instructive. Opposed to the exemption, he expressed his concerns that the legislation

immunizes the contents of a joint agreement. What is this joint agreement?

... It contains all manner and kinds of operations under the league that would be formed, including the common draft, *the division of territory, an arbitrary method of doling out franchises*, and all manner and kinds of additional operations *which presently come within the four squares of the antitrust laws*.

That is what we will be immunizing . . . . That is why I want to have some hearings. I did not want to buy a pig in a poke.

Congressional Record, no. 112, p. 28231 (20 Oct. 1966) (emphasis supplied). Proponents of the legislation offered assurances that no such modification of the antitrust laws was intended:

[A]ntitrust will apply to them hereafter acting as a single league and it does not exempt anything that flows from the contract which [Mr. Celler] has referred to.

*Id.*, at 28234; see *id.*, at 28233. And the legislation itself disclaimed any affect on the "applicability or nonapplicability of the antitrust laws" to any agreement (except one expressly identified) or "other activity" by the members of the combined league. 15 U.S.C. § 1294.

In 1972, the Senate Committee on the Judiciary reported on a bill similarly exempting the proposed merger of two professional basketball leagues. The Committee found that the proposed legislation

is in the public interest, but only if certain restrictions are placed upon the operating rules of the merged entity. *It is clear that merger should do more than simply create lucrative monopoly rights beyond the reach of the antitrust laws* . . . .

Senate Rpt. No. 92-1151, 92nd Cong. 2d Sess., at 5 (emphasis supplied). The report further stated that because of such a partial exemption, "professional team sports enjoy a position of special trust which should not be used to deprive segments of the public from the monopolized product." *Id.*, at 6 (emphasis supplied).

immunity for respondents' "division of territory" and "arbitrary method of doling out franchises" (Congressional Record, no. 112, p. 28231 (20 Oct. 1966), *quoted in note 7 supra*) which Congress has consistently refused to confer in law. The court must be reversed.

**The Court's Decision Stands In Conflict With The "Essential Facility Doctrine".**

Had the circuit court applied, as did the Second Circuit and as Congress intended, the "well-recognized standards of our antitrust laws rather than permit their exemption" (*North American Soccer League, supra*, 670 F.2d at 1257), it would have held that the NFL is an essential, "bottleneck" facility. The court had "no doubt" that respondents' dominant market power, concentrated in the NFL, "presents a formidable barrier" to the formation of a rival league. 720 F.2d at 785 n.7. And in fact, in October 1975, the WFL, the only rival league since the AFL-NFL merger, collapsed, in part because of the NFL's unshakable lock on network television revenues. Bassett Depo. at 218-219. Petitioners, as ex-WFL members, were producer-participants in the market facing the "formidable barrier" recognized by the panel. Given those facts, and applying the well-established essential facilities doctrine, the panel should have held that respondent-monopolists had no discretion arbitrarily, without procompetitive justification, to refuse petitioners access to the facility on fair, reasonable and equal terms. *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246 (1963); *United States v. International Boxing Club of N.Y.*, 348 U.S. 236, 75 S.Ct. 259 (1955); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945); *United States v. Terminal R.R. Ass'n. of St. Louis*, 224 U.S. 383, 32 S.Ct. 507 (1912); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

But instead, and citing no authority for the proposition, the court held that the "essential facilities doctrine

is predicated on the assumption that admission of the excluded applicant would result in additional competition . . . ". 720 F.2d at 787. Since the court could see no competition, it could see no benefit from petitioners' entry to the market. It therefore refused to apply the essential facilities doctrine. *Ibid.*

The analyses and holdings below are fatally flawed in every premise upon which they rest. The court adopted a construction of the Sherman Act entirely at odds with established authority from this Court and many other Circuit Courts. Even when it admitted anticompetitive intent and anticompetitive effect in the relevant raw materials product-market, the court denied that petitioners' injury was "caused" by respondents' anticompetitive activity in that market.

The circuit court granted in practical effect an immunity arbitrarily to exclude any qualified prospective market-entrant wanting to put a football team in a city not presently the geographic-submarket of an existing NFL member. The import of this decision is horrifying to consider. If respondents have immunity to exclude because they are not competitors, then they necessarily have immunity to *expel*. Under the circuit court's rationale, respondents could arbitrarily expel any existing member located in a geographic-submarket having no other NFL member in it, because there would be no competition to be injured thereby. Indeed, according to the court, such action would be "patently pro-competitive" because it would make one more city "available as a site for another league's franchise" and would leave the expelled member "as a potential competitor in such a league". 720 F.2d at 786.

In short, the court conferred upon respondents' arbitrary power to dole out franchises, to hoard the cartel pie entirely unto themselves, to take back franchises and to redistribute the cartel pie in fewer shares to fewer market participants. The court's decision so far conflicts with established antitrust tenets and so frustrates mani-

fest congressional intent as to require review on certiorari by this Court.

**Respondents' By-Laws Consigned Membership Decisions To Their Subjective Discretion Unfettered By Objective Standards, And Were So Fraught With Anticompetitive Potential As To Be Facially Unreasonable.**

Respondents' By-Laws prescribed the admission criteria and procedure for passing on applications like petitioners'. The only substantive criterion was that the applicant be of "good repute", an inherently subjective evaluation. The procedure expressly consigned the admission decision to the subjective discretion of the markets' existing producers, unfettered and unbounded by reasonable, objective decisional criteria. The procedure provided that the application could be approved only by affirmative vote of at least 21 of the 28 owners then in the NFL. By-Laws, Article III, §3.3(C). Thus, any 8 owners *combining in service to any motive* could foreclose entry by an applicant, however qualified.

The district court found that respondents exercised complete monopoly power in the relevant market. 550 F.Supp. at 577 & n.33. The circuit court had no doubt that respondents posed a formidable barrier to the formation of a competitor-league (720 F.2d at 785 n.7 and accompanying text), which the court held was relevant "to the extent that it bears on the obligation to permit entry" (*ibid*). Both courts should then have held, as petitioners argued, that in the presence of monopoly power, the inherently subjective decisional process was so fraught with anticompetitive potential as to be "facially unreasonable", according as it undisputedly did, arbitrary "power to exclude". *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1383 (5th Cir. 1980) (footnote omitted).

In *Board of Regents*, the circuit court recognized that an

association's rule or practice can in certain circumstances be considered facially unreasonable, see *Fashion Originators' Guild; Radiant Burners; Associated Press* . . . , and thus can be summarily invalidated as an illegal boycott.

707 F.2d at 1161 (citation omitted). But the court found that the expulsion sanction there at issue appeared to be an enforcement mechanism ancillary to an integration of the members' rulemaking functions, and thus "not a sham for anticompetitive purpose." *Ibid.*

Here, to the contrary, the admission decision at issue was expressly consigned to the subjective discretion of any 8 of the market's 28 producers, free to vote in service to any motive with neither guidance nor hindrance by objective, reasonable decisional criteria. Moreover, on the limited discovery which was allowed, it stands undisputed that these competitors voted their subjective, "pocketbook" concerns to impose an absolute moratorium on new market entry, because they did not wish to share the available revenue from television broadcast sales and did not wish to contend with the dilution of playing talent which they believed would accompany market expansion.

In such circumstances, the membership criteria and the written procedure for new membership determinations which here prevailed were facially unreasonable. *Realty Multi-List*, supra, 629 F.2d 1351. See *Silver v. New York Stock Exchange*, supra, 373 U.S. 341, 83 S.Ct. 1246; *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 481-484 (5th Cir. 1966) (monopolists' exclusionary decision made under unreasonable standards drawn up *post hoc* and arbitrarily applied *held contra* Sherman Act, §2); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, supra, 194 F.2d at 487-488 (association's exclusionary decision made absent objective, reasonable selection criteria *held prima facie contra* Sherman Act, §2). Summary judgment for respondents thus was unwarranted.

**The Court Held That Exclusion Of Petitioners From The NFL Incurred No Section 2 Liability Even Assuming Monopoly Power And Intent To Maintain The Monopoly. The Court's Decision Defies Authority From This Court And Undermines The Effectiveness Of The Antitrust Laws.**

In the instant case, on petitioners' claim that respondents abused their monopoly power by arbitrarily excluding petitioners without applying objective standards to the decision, the circuit court adopted its analysis of the Section 1 Sherman Act claim (720 F.2d at 788) and held that petitioners had "failed to show that their [exclusion was] contra-competitive in any way. Indeed the Memphis home team market has been left by the NFL for potential competitors" (*ibid.*). Thus the court echoed its Section 1 ruling that since there was no competition shown among respondents *inter se*, it could see no injury to competition from the exclusion of petitioners.

The court acknowledged petitioners' contention that they could prove anticompetitive intent behind the exclusionary decision, both an intent to retaliate against them as prior competitors and an intent to reserve a geographic submarket for the monopolists' future use. 720 F.2d at 786. The court assumed that the record "presents disputed fact issues with respect to the actual motivation of the NFL members . . . ." *Ibid.* Respondents adduced *no* evidence that petitioners had any practicable, reasonable alternative to membership in the NFL, and indeed the circuit court having found that respondents' association poses a formidable barrier to any alternative.

In these circumstances, the court should have held that respondents had no discretion arbitrarily to exclude petitioners. Respondents' lawful acquisition of monopoly power is immaterial. *United States v. Griffith*, 334 U.S. 100, 68 S.Ct. 941 (1948) (anticompetitive use of lawfully

acquired monopoly power *held contra* Sherman Act, §2). It is because of the possession of such power, however acquired, that "added obligations are imposed on the defendant which would not attach in the ordinary refusal to deal context." *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 855 (6th Cir. 1980). Therefore, when a collective holds monopoly power by control of an essential facility, the "added obligations" are that entry to the facility be available on fair and equal terms, and that reasonable, objective criteria govern any power of exclusion. *Silver v. New York Stock Exchange*, *supra*, 373 U.S. 341, 83 S.Ct. 1246; *United States v. International Boxing Club of N.Y.*, *supra*, 348 U.S. 236, 75 S.Ct. 259; *Associated Press v. United States*, *supra*, 326 U.S. 1, 65 S.Ct. 1416; *United States v. Terminal R.R. Ass'n of St. Louis*, *supra*, 224 U.S. 383, 32 S.Ct. 507.

Once it is determined that the [membership] program is not an objective one, no further evaluation . . . is appropriate. . . . [C]ourts will decline to weigh and measure the harms and benefits . . . .

*United States v. Realty Multi-List, Inc.*, *supra*, 629 F.2d at 1383, *quoting with approval* L. Sullivan, Antitrust 249 (1977).

In these circumstances, the court was plainly wrong when it held that respondents' anticompetitive exclusion of petitioners from play in the NFL was immaterial because "the action complained of produced no injury to competition" (720 F.2d at 786). The injury and the exclusion were one and the same. *Lorain Journal Co. v. United States*, 342 U.S. 143, 155, 72 S.Ct. 181, 187 (1951) (power of trader to select in "his own independent discretion . . . parties with whom he will deal" circumscribed and denied in presence of "purpose to . . . maintain a monopoly"); *United States v. Griffith*, *supra*, 334 U.S. 100, 68 S.Ct. 941.

The circuit court acknowledged petitioners' contention that they were excluded because respondents were

reserving the Memphis geographic-submarket for their own future use. 720 F.2d at 786. The record reveals that respondents themselves considered 30 teams to be a good size for the league, that their own research study identified numerous geographic locales, including Memphis, capable of supporting a new team, and that many cities and entrepreneurs not already in the NFL consistently applied for expansion franchises and were consistently ignored. There thus existed a supply of potential franchise sites and a demand for them. Because of respondents' strangle-hold on expansions and determination to impose a moratorium on new admissions, the expected competition for the potential franchise sites was stillborn. Indeed, by withholding Memphis for their own future use from petitioners who wanted it for immediate use, respondents themselves became competitors for the expansion site and suppressed trade among all market forces competing for the sites. *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, *supra*, 194 F.2d 484. See also *United States v. Associated Press*, 52 F.Supp. 362 U.S. 1, 65 S.Ct. 1416 (1945) (cooperative association gathering news); *American Federation of Tobacco Growers v. Neal*, 183 F.2d 869 (4th Cir. 1950) (association withholding place on auction list); *Blalock v. Ladies Professional Golf Ass'n.*, 359 F.Supp. 1260 (N.D. Ga. 1973) (limited number of positions available in sports tournament). As in *Gamco*, respondent-monopolists here abused their monopoly power by arbitrarily denying a qualified expansion site to a new market entrant.

By its holding here, the circuit court defied long established precedent from this Court. Where other decisions of Courts of Appeals threatened seriously to undermine the effectiveness of the antitrust laws as a bulwark of antitrust enforcement, this Court has not hesitated to grant certiorari. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 88 S.Ct. 1981, 1984-1985 (1968). The courts have no "power to under-

mine the antitrust acts by denying recovery to injured parties . . . ." *Ibid.* Nor should the circuit court here be allowed to undermine the Act.

### CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Court may resolve the direct conflict between the Ninth and Third Circuits, and correct the decision below.

Respectfully submitted,

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